

1 As a matter of comity, a federal court will not entertain a habeas corpus petition
 2 unless the petitioner has exhausted the available state judicial remedies on every
 3 ground presented in the petition. *Rose v. Lundy*, 455 U.S. 509, 518-22, 102 S. Ct.
 4 1198, 71 L. Ed. 2d 379 (1982). The habeas statute now explicitly provides that a
 5 habeas petition brought by a person in state custody “shall not be granted unless it
 6 appears that -- (A) the applicant has exhausted the remedies available in the courts of
 7 the State; or (B)(I) there is an absence of available State corrective process; or (ii)
 8 circumstances exist that render such process ineffective to protect the rights of the
 9 applicant.” 28 U.S.C. § 2254(b)(1). Moreover, if the exhaustion requirement is to be
 10 waived, it must be waived expressly by the State, through counsel. *See* 28 U.S.C. §
 11 2254(b)(3).

12 Exhaustion requires that the prisoner’s contentions be fairly presented to the
 13 state courts, and be disposed of on the merits by the highest court of the state.
 14 *Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979). A claim has not been fairly
 15 presented unless the prisoner has described in the state court proceedings both the
 16 operative facts and the federal legal theory on which his claim is based. *See Duncan v.*
 17 *Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995); *Picard v.*
 18 *Connor*, 404 U.S. 270, 275-78, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971); *Johnson v.*
 19 *Zenon*, 88 F.3d 828, 830 (9th Cir. 1996). A federal court may raise the failure to
 20 exhaust issues *sua sponte* and may summarily dismiss on that ground. *See Stone v.*
 21 *San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992); *Cartwright v. Cupp*, 650 F.2d 1103,
 22 1104 (9th Cir. 1981) (*per curiam*); *see also Granberry v. Greer*, 481 U.S. 129, 134-35,
 23 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987).

24 Petitioner has the burden of demonstrating that he has exhausted available state
 25 remedies. *See, e.g., Brown v. Cuyler*, 669 F.2d 155, 158 (3rd Cir. 1982). Here, it
 26 plainly appears from the face of the Petition that Petitioner cannot meet this burden
 27 with respect to his claim.

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1 If it were clear that Petitioner is raising a federal claim and that the California
2 Supreme Court would hold that Petitioner's unexhausted federal claim was
3 procedurally barred under state law, then the exhaustion requirement would be
4 satisfied. In that event, although the exhaustion impediment to consideration of
5 Petitioner's claim on the merits would be removed, federal habeas review of the claim
6 would still be barred unless Petitioner could demonstrate "cause" for the default and
7 "actual prejudice" as a result of the alleged violation of federal law, or demonstrate
8 that failure to consider the claims would result in a "fundamental miscarriage of
9 justice." See *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d
10 640 (1991). However, it is not "clear" here that the California Supreme Court will
11 hold that Petitioner's claim (whatever it may be) is procedurally barred under state law.
12 See, e.g., *In re Harris*, 5 Cal. 4th 813, 825 (1993) (granting habeas relief where
13 petitioner claimed sentencing error, even though the alleged sentencing error could
14 have been raised on direct appeal); *People v. Sorensen*, 111 Cal. App. 2d 404, 405
15 (1952) (noting that claims that fundamental constitutional rights have been violated
16 may be raised by state habeas petition).

17 The Court therefore concludes that this is not an appropriate case for invocation
18 of either exception to the exhaustion requirement regarding the existence of an
19 effective state corrective process.

20 Therefore, the Petition is subject to dismissal.

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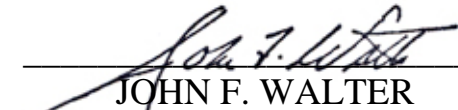
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1 IT IS THEREFORE ORDERED that this action be summarily dismissed without
2 prejudice, pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United
3 States District Courts.

4 LET JUDGEMENT BE ENTERED ACCORDINGLY.

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6 Dated: December 29, 2015

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8 
9 JOHN F. WALTER
10 United States District Judge

11 Presented by:

12
13 /S/ FREDERICK F. MUMM
14 FREDERICK F. MUMM
15 United States Magistrate Judge
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